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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967 No. 493

VICTOR E. ORIGONI,
Petitioner,

v.

BULLETIN COMPANY,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

E. BARCLAY CALE, JR.,
WILLIAM J. CURTIN,
JOHN R. MCCONNELL,
Attorneys for Respondent.

Of Counsel:

MORGAN, LEWIS & BOCKIUS
1120 Connecticut Avenue, N.W.
Washington, D.C.

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

TABLE OF CONTENTS

		PAGE
I.	TABLE OF AUTHORITIES CITED	2
II.	OPINIONS BELOW	1
III.	JURISDICTION	1
IV.	QUESTION PRESENTED	1
	Where the District Court erroneously concluded that certain decisions of the Court of Appeals "had been overruled *sub silentio*" and need not be followed, and pursuant to that conclusion entered an order in direct conflict with those decisions, did the Court of Appeals err in reversing the lower court for its failure to follow those decisions?	1
V.	STATUTE INVOLVED	2
VI.	STATEMENT	2
VII.	ARGUMENT	3
	(a) This case involves the construction and application of a local District of Columbia jurisdictional statute which is in no way in conflict with any decision of this Court; and	3
	(b) The District Court was properly reversed for its failure to follow the applicable decisions of the Court of Appeals construing that statute	5
VIII.	CONCLUSION	14
	The petition for a writ of certiorari should be denied	14

Table of Authorities Cited

CASES: PAGE

Bilbrey *v.* Chicago Daily News, 57 F. Supp. 579 (D.C.D.C., 1944) 7

Electric Storage Battery Co. *v.* Shimadzu, 307 U.S. 5 (1939) 13

Fandel *v.* Arabian American Oil Co., 120 U.S. App. D.C. 193, 345 F.2d 87 (1965) 5

Fehlhaber Pile Co., Inc. *v.* Tennessee Valley Authority, 81 U.S. App. D.C. 124, 155 F.2d 864 (1946) 3, 10

Fiat Motor Co., Inc. *v.* Alabama Imported Cars, Inc., 110 U.S. App. D.C. 252, 292 F.2d 745, *cert. denied*, 368 U.S. 898 (1961) 7, 8

Francis *v.* Southern Pacific Co., 333 U.S. 445 (1958) .. 13

Goldberg *v.* Southern Builders, Inc., 87 U.S. App. D.C. 191, 184 F.2d 345 (1950) 7

International Shoe Co. *v.* State of Washington, 326 U.S. 310 (1945) 4, 7

Layne *v.* Tribune Co., 63 App. D.C. 213, 71 F.2d 223, *cert. denied*, 293 U.S. 572 (1934) 6

McGee *v.* International Life Ins. Co., 355 U.S. 220 (1957) 7

Mueller Brass Co. *v.* Alexander Milburn Co., 80 U.S. App. D.C. 274, 152 F.2d 142 (1945) 10

Neely *v.* Philadelphia Inquirer Co., 61 App. D.C. 334, 62 F.2d 873 (1932) 5

Perkins *v.* Benguet Consolidated Mining Co., 342 U.S. 436 (1952) 4, 7

Traher *v.* DeHavilland Aircraft of Canada, Ltd., 111 U.S. App. D.C. 33, 294 F.2d 229 (1961), *cert. denied*, 368 U.S. 954 (1962) 11

STATUTES:

D.C. Code, 1961, Sup. V., 13-334 2

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BRIEF IN OPPOSITION

Opinions Below

The opinions below are set forth in the petition for a writ of certiorari as Appendices A, B and C.

Jurisdiction

Respondent adopts the statement of jurisdiction as set forth in the petition for a writ of certiorari.

Question Presented

Where the District Court erroneously concluded that certain decisions of the Court of Appeals "had been overruled *sub silentio*" and need not be followed, and pursuant

to that conclusion entered an order in direct conflict with those decisions, did the Court of Appeals err in reversing the lower court for its failure to follow those decisions?

Statute Involved

The statute involved is set forth in the petition for a writ of certiorari at pages 2-3.

STATEMENT

Petitioner instituted this action against Bulletin Company, a Pennsylvania corporation which publishes the Evening and Sunday Bulletin in Philadelphia, Pennsylvania and two other defendants, District News Company, Inc., and Drug Fair of D.C., Inc., alleging that Bulletin Company published a libelous story about appellee in its Sunday Bulletin.

The defendant District News Company, Inc., is an independent newsdealer which purchases Bulletin Company's newspapers in Philadelphia and distributes them in the District of Columbia. The defendant Drug Fair of D.C., Inc. operates stores in the District where these newspapers are sold.

Service of process on Bulletin Company was attempted pursuant to D.C. Code, 1961 ed., Sup. V, § 13-334 by leaving a copy of the complaint at 1238 National Press Building, Washington, D.C. This is an office rented by Bulletin Company and staffed by three newsmen and a secretary. These employees have the sole duty of gathering news and transmitting it back to Philadelphia. This is the only office maintained by Bulletin Company in the District of Columbia.

In reliance on two previous decisions of the Court of Appeals for the District of Columbia Circuit holding that it was not the intention of Congress in enacting the section of the D.C. Code found at § 13-334 to make out-of-town newspapers which only maintain offices and reporters in

the District of Columbia for the purpose of gathering news amenable to service of process there, Bulletin Company moved to quash service of process on it. The District Court denied Bulletin Company's motion, holding that the previous decisions of the Court of Appeals relied on by Bulletin Company had been overruled *sub silentio.*

Bulletin Company applied for permision to take an interlocutory appear from this order under 28 U.S.C. 1292(b) and on November 27, 1966 this permission was granted.

The Court of Appeals on May 8, 1967, reversed the District Court and held that the previous decisions relied on by Bulletin Company had not been overruled *sub silentio* and were still the law of the District of Columbia.

Petitioner on August 15, 1967 filed a petition for a writ of certiorari with this Court in opposition to which this brief is respectfully submitted.

ARGUMENT

This case involves the construction and application of a local District of Columbia jurisdictional statute which is in no way in conflict with any decision of this Court.

This is an action for libel brought in the United States District Court for the District of Columbia under its local court jurisdiction and service of process is therefore governed by the provisions of the District of Columbia Code rather than those of the United States Code. *Fehlhaber Pile Co., Inc.* v. *Tennessee Valley Authority,* 81 U.S. App. D.C. 124, 125, 155 F.2d 864, 865 (1946). Service of process on Bulletin Company was attempted under D.C. Code, 1961 ed., Sup. V, § 13-334 by leaving a copy of the complaint at Bulletin Company's office in the District of Columbia.

Petitioner argues in spport of his petition for writ of certiorari that the decision of the Court of Appeals below

holding that it was not the intention of Congress in enacting the above cited statute to make out-of-town newspapers which only maintain offices and reporters in the District for the purpose of gathering news amenable to service of process there, misapplies the rationale of this Court's decisions in *International Shoe Co.* v. *State of Washington*, 326 U.S. 310 (1945); *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 436 (1952), and *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957).

A cursory review of these cases is all that is necessary to demonstrate that they are in no way in conflict with the decision below. In the *International Shoe Co.* case, for example, the issues were first, whether within the limitations of the due process clause of the Fourteenth Amendment the defendant by its activities in the State of Washington had rendered itself amenable to proceedings in the courts of that state to recover unpaid contributions to the state unemployment compensation fund and second, whether the state could exact those contributions consistently with the due process clause of the Fourteenth Amendment.

Similarly in the *Perkins* case the question was whether the due process clause of the Fourteenth Amendment precluded Ohio from subjecting a foreign corporation to the jurisdiction of its courts in an *in personam* action. And in the *McGee* case, the issue was whether the due process clause of the Fourteenth Amendment precluded a California court from entering a binding judgment against a Texas insurance company.

As the foregoing summaries demonstrate, all three of these cases dealt with the limitations imposed by the due process clause of the Fourteenth Amendment on state court jurisdiction. None of them were concerned with the proper construction of the District of Columbia jurisdictional statute involved in this case.

The inapplicability of these cases to the instant case was made clear by the Court of Appeals in its opinion in

Fandel v. *Arabian American Oil Co.*, 120 U.S. App. D.C. 193, 345 F.2d 87 (1965). In that case the court was called upon to decide whether an oil company was amenable to service under D.C. Code, 1961 ed., Sup. V, § 13-334. It was apparently argued by plaintiff's counsel that the *International Shoe Co.* case required an affirmative answer.

On the basis of the record before it, the court held that the oil company was not doing business in the District and disposed of the argument that the *International Shoe Co.* case required a different conclusion with the following language:

> "We are construing what a statute does, and not determining what the furthest reach of legislative power could be consistent and constitutional limitations." 120 U.S. App. D.C. at 195, 345 F.2d at 89.

That is precisely the issue in this case.

The District Court was properly reversed for its failure to follow the applicable decision of the Court of Appeals construing that statute.

In two prior decisions interpreting the jurisdictional statute at issue the Court of Appeals held that it was not the intention of Congress in enacting it to make out-of-town newspapers which only maintain offices and reporters in the District of Columbia to gather news amenable to service of process there. The first of these cases was *Neely* v. *Philadelphia Inquirer Co.*, 61 App. D.C. 334, 62 F.2d 873 (1932). There suit was brought against the Philadelphia Inquirer and service of process attempted under D.C. Code, 1929 ed., § 24-373. This section has been reenacted by Congress without substantive change as D.C. Code, 1961 ed., Sup. V, § 13-334.

The record before the court in the *Neely* case disclosed that the Inquirer leased two office rooms in the National Press Building and had a full time correspondent employed there. The newspaper paid the rent for the

office as well as all of the other expenses incidental to running the office. The Inquirer's name was on the door of the office and its name and telephone number were listed in the Washington telephone directory. The correspondent's duties were to gather news and transmit it back to Philadelphia.

On the basis of the foregoing record, the court held that such activity did not constitute "doing business" in the District of Columbia so as to make the Inquirer amenable to service of process:

> ". . . we think the mere collection of news material here for use in subsequent publications elsewhere, in the manner and extent shown in this case, is not a doing of business here, within the meaning of the statute.
>
> "As the seat of national government, Washington is the source of much news of national importance, which makes it desirable in the public interest that many newspapers should maintain vigilant correspondents here. If the employment of a Washington correspondent, the announcement of his address, and the payment of his office rent, subjects a nonresident newspaper corporation to legal process in Washington for matter appearing in its paper at home, it would bring in nearly every important newspaper in the nation, and many foreign publishing corporations, which in our opinion the present statute does not do." 61 App. D.C. at 336, 62 F.2d at 875.

Two years later the Court of Appeals was again called upon to construe this same section of the D.C. Code in *Layne* v. *Tribune Co.*, 63 App. D.C. 213, 71 F.2d 223, *cert. denied,* 293 U.S. 572 (1934). There the defendant newspaper also maintained an office in the District of Columbia and employed a staff consisting of a Chief Reporter, three reporters, and two telegraph operators.

The defendant leased a telegraph line from Washington to Chicago and had its telephone number listed in the Washington telephone directory. The Chief Reporter was authorized to employ additional telegraph operators and purchase supplies for the office in the District. The newspaper in which the story appeared, The Daily Tribune, was circulated extensively throughout the country.

On the basis of the foregoing facts, the court held that the case was governed by the *Neely* case and Tribune Co.'s plea to the jurisdiction of the District Court was sustained.

Both of these cases were subsequently followed by the United States District Court for the District of Columbia in *Bilbrey* v. *Chicago Daily News*, 57 F. Supp. 579 (D.C.D.C. 1944) This was an action brought by a member of the District of Columbia bar for an allegedly libelous story appearing in the defendant newspaper. The record disclosed that the defendant's only contact with the District of Columbia was its maintenance of a correspondent in the District to gather and transmit news. The Court held that the case was governed by the *Neely* and *Layne* cases and granted defendant's motion to quash service of process.

In the instant case the record makes clear that Bulletin Company's activity within the District of Columbia has been no greater nor of any different kind than that of the newspaper defendants in the aforecited cases. The District Court in denying Bulletin Company's motion to quash service of process in fact did not attempt to distinguish the *Neely* and *Layne* cases but rather concluded that they had been overruled *sub silentio* by subsequent cases citing *International Shoe Co.* v. *State of Washington*, 326 U.S. 310 (1945); *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 436 (1952); *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957); *Goldberg* v. *Southern Builders, Inc.*, 87 U.S. App. D.C. 191, 184 F.2d 345 (1950), and *Fiat Motor*

Co., Inc. v. *Alabama Imported Cars, Inc.*, 110 U.S. App. D.C. 252, 292 F.2d 745, *cert. denied*, 368 U.S. 898 (1961).

The two decisions of the Court of Appeals relied on by the District Court are factually distinguishable and in no way purport to overrule or modify the *Neely* and *Layne* cases.

In *Goldberg* v. *Southern Builders, Inc.*, 87 U.S. App. D.C. 191, 184 F.2d 345 (1950), a foreign corporation (Magnolia) was served as a garnishee. The record disclosed that Magnolia's articles of incorporation had been executed in the District of Columbia, its Board of Directors meetings were all held in the District, it had entered into a substantial contract in the District with an architect for the construction of a large housing project in Virginia and had executed the mortgage agreement for the project in the District; it had a bank account in the District and paid all of its bills by checks drawn on this account, and all of its records, books, correspondence, and checkbooks were in the custody of the secretary of the corporation whose office was in the District. This Court said:

> "It seems clear that Magnolia's contacts with the District have been regular and systematic. It also is clear, with regard to the reasonableness of suit here, that the District of Columbia is probably the most convenient forum to Magnolia. As we have noted, its books, records, officers, all are in the District. While the day-to-day operations of the housing project may be managed in Virginia, unquestionably the general operation and supervision of the corporation's affairs is conducted in the District. Although Magnolia was incorporated in Delaware, the District of Columbia, was, in effect, its home." 87 U.S. App. D.C. at 194, 184 F.2d at 348.

The facts of the foregoing case demonstrate without the necessity of additional argument how clearly distin-

guishable that case is from the case at bar. Certainly the *Goldberg* case cannot be said to overrule or modify the *Neely* and *Layne* cases in any sense whatever.

The second case of the Court of Appeals relied on by the District Court, *Fiat Motor Co., Inc.*, v. *Alabama Imported Cars, Inc.*, 110 U.S. App. D.C. 252, 292 F.2d 745, *cert. denied,* 368 U.S. 898 (1961), is also factually distinguishable from the instant case. In that case plaintiff was an Alabama corporation which brought suit under the Automobile Dealers' Franchise Act against Fiat Motor Company (Fiat), a New York corporation with its principal place of business in New York City, and Roosevelt Automobile Company (Roosevelt), a Delaware corporation with its principal place of business in the District of Columbia. Service of process on Fiat was attempted by leaving a copy of the complaint with the President of Roosevelt in the District of Columbia.

The record disclosed that Roosevelt had entered into a lengthy distributor sales agreement with Fiat whereunder Roosevelt was appointed an authorized distributor of Fiat vehicles, parts, and equipment for the District of Columbia and nine southeastern states. Roosevelt was obligated under the agreement to promote the sales of Fiat products, use advertising materials provided by Fiat, establish and equip to the satisfaction of Fiat places of business in the District of Columbia and Florida, maintain those locations in good condition, and change such locations only with the prior consent of Fiat. The agreement further required Roosevelt to keep records and reports as directed by Fiat and furnish them to Fiat upon request, maintain certain stated working capital and net worth, employ personnel in certain stated capacities, and insure their attendance at Fiat training schools.

After reviewing the relationship between Fiat and Roosevelt as evidenced by the agreement between them, the Court of Appeals concluded:

> "These and other provisions of the agreement manifest a continuing business relationship involving the supervision and control by Fiat of numerous details of the Roosevelt business. . . . In our view this relationship subjects Fiat to service in the District whether that issue is considered to be governed by federal or local standards." 110 U.S. App. D.C. at 254, 292 F.2d at 747.

Here again, the facts of the case distinguish it from the instant case.

In both the *Goldberg* and *Fiat* cases the defendant's activity within the District of Columbia was of a typical commercial nature and in neither was the corporate presence in the District required because of the unique status of Washington as the nation's capital. This element, which is missing in both of those cases, is actually the distinguishing characteristic of cases like *Neely* and *Layne*.

This same underlying policy has also been applied by the Court of Appeals even to commercial activity where the activity by necessity had to take place in the District of Columbia due to the presence of the federal government there. See, e.g., *Mueller Brass Co.* v. *Alexander Milburn Co.*, 80 U.S. App. D.C. 274, 152 F.2d 142 (1945) (maintenance in Washington of a representative by a manufacturer for the purpose of gathering information from Government departments and for convenience of communication between the Government and the company in respect to Government work being done throughout the country held not to make manufacturer amenable to service of process in the District); *Fehlhaber Pile Co., Inc.* v. *Tennessee Valley Authority*, 81 U.S. App. D.C. 124, 155 F.2d 864 (1946) (maintenance of an office with a staff in Washington to obtain information concerning matters which might effect TVA, circulate information concerning TVA to public officials and to the public, arrange meetings between officials of TVA and officials of other agencies

of the government, represent TVA in purchases from other agencies and provide space and office service for TVA officials visiting Washington held not to make TVA amenable to service); *Traher* v. *DeHavilland Aircraft of Canada, Ltd.*, 111 U.S. App. D.C. 33, 294 F.2d 229 (1961) (Canadian aircraft manufacturer held not to be amenable to service of process where the record showed that the main plant of the defendant was in Canada and it maintained only a liaison or contact man with the United States government in Washington whose principal duties were to transmit information about the United States government's requirements and to keep in contact with the governmental agencies).

In the most recent case construing this statute, *Fandel* v. *Arabian American Oil Co.*, 120 U.S. App. D.C. 193, 345 F.2d 87 (1965), residents of California brought suit for personal injuries sustained in Saudia Arabia against a Delaware corporation. The defendant moved to quash service of process and dismiss the action for lack of jurisdiction on the grounds that it was not doing business within the meaning of D.C. Code, 1961 ed., Sup. V, § 13-334. The lower court granted defendant's motion and on appeal the lower court's order was affirmed.

The pleadings, affidavits, and depositions disclosed that the defendant had for several years maintained a six-room office in a downtown Washington office building occupied by five of its employees. The payroll of the office was $10,000 per month and the defendant's name was listed in the Washington telephone directory. All production and deliveries of the defendant, however, took place outside the District of Columbia and no business was solicited by advertising or otherwise in the District.

The defendant's office in the District of Columbia was primarily charged with maintaining continuing relationships with the State Department and other executive agencies of the United States government, with diplomatic missions accredited to the government, and with educa-

tional and international organizations, private and public, interested in or informed about the Middle East generally and Saudia Arabia in particular. These employees also gathered information of interest to the defendant and reported this back to the executive staff directing the business operations in Saudia Arabia. There were occasional contacts between defendant's employees and the Washington representatives of other American oil companies who transact business with defendant in the Middle East.

After noting the Washington office's importance to the company as a whole, the Court of Appeals noted that this office was in Washington only because Washington is the capital city of the United States. Because of this, the court held that the defendant's presence was of a kind which had been theretofore uniformly regarded as falling outside the range of congressional contemplation of the scope of doing business as that phrase is used in D.C. Code, 1961 ed., Sup. V, § 13-334. The court then cited with approval some of the cases discussed *supra* including the *Neely* and *Layne* cases.

> "These cases, although embodying variously different factual circumstances, seem to us to constitute a recognition that Washington presents many business organizations with special needs for a continuous and ponderable physical presence there, which needs are not those customarily associated with strictly commercial operations; and that the purpose of Congress was not to make that presence in every case a base for the assertion of personal jurisdiction." 120 U.S. App. D.C. at 195, 345 F.2d at 89.

The interpretation of D.C. Code, 1961 ed., Sup. V, § 13-334 as enunciated in the preceding cases has been approved and adopted by Congress. When the Court of Appeals decided both the *Neely* and *Layne* cases, the section of the D.C. Code authorizing service of process on

foreign corporations was found in the 1929 Edition at Title 24, Section 373. This section in its relevant portion read as follows:

> "In actions against foreign corporations doing business in the District all process may be served on the agent of such corporation or person conducting its business, or, in case he is absent and cannot be found, by leaving a copy at the principal place of business in the District, or, if there be no such place of business, by leaving the same at the place of business or residence of such agent in said District, and such service shall be effectual to bring the corporation before the court."

In 1963 Congress revised, codified and enacted the general and permanent laws relating to the judicial and judiciary procedures of the District of Columbia in Public Law 88-241, 77 Stat. 513. The section under which service of process was attempted here, which was codified as D.C. Code, 1961 ed., § 13-103 prior to the passage of the 1963 act, was re-enacted without substantive change as D.C. Code, 1961 ed., Sup. V, § 13-334.

It is well settled that where the courts have construed a statute and Congress thereafter re-enacts the statute without changing the settled construction, this indicates that the prior construction has become part of the "warp and woof of the legislation." *Francis* v. *Southern Pacific Co.*, 333 U.S. 445, 450 (1948). The re-enactment of D.C. Code, 1961 ed., Sup. V, § 13-334 without substantive change requires this Court to "assume that it [Congress] has been satisfied with, and *adopted*, the construction given to its enactment by the Courts". *Electric Storage Battery Co.*, v. *Shimadzu*, 307 U.S. 5, 14 (1934). (Emphasis added.)

It is submitted that not only have the cases of the Court of Appeals construing D.C. Code, 1961 ed., Sup. V, § 13-334 not been overruled, but Congress has approved and adopted the court of Appeals construction of it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted

E. Barclay Cale, Jr.,
William J. Curtin,
John R. McConnell,
Attorneys for Respondent.

Of Counsel:

Morgan, Lewis & Bockius
1120 Connecticut Avenue, N.W.
Washington, D.C.